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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 717

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

—v.—

RADIO TELEVISION NEWS DIRECTORS
ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT NATIONAL BROADCASTING COMPANY, INC.

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Respondent National Broadcasting Company, Inc. (hereinafter "NBC") agrees that the petition for certiorari should be granted. NBC, along with the other respondents, has previously taken every available step open to it to urge that this Court consider the present case together with *Red Lion Broadcasting Co., Inc.* v. *FCC*, 381 F.2d 908 (D.C. Cir.), *cert. granted*, 389 U.S. 968 (1967) (No. 2, this Term).*

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* See Brief of National Broadcasting Co., Inc. as Amicus Curiae filed last term in Red Lion (No. 600, 1967 Term); Respondents' petition for certiorari before judgment in this case last term, No. 993; *Radio Television News Directors Association* v. *United States*, *cert. denied*, 390 U.S. 922 (1968).

Questions Presented

NBC submits that the issues raised by the case and which should be considered by this Court are as follows:

1. Whether the Commission's "personal attack" and "political editorializing" rules are consistent with the First Amendment.

2. Whether the issuance of the rules is within the Commission's authority under the Communications Act of 1934, as amended.

Statement

NBC believes that the Court of Appeals correctly* decided that the Commission's rules impose substantial burdens on the broadcasting of facts and opinion about controversial issues, that they are unreasonable because of both their sweep and vagueness, and that these unreasonable burdens have a sufficiently chilling effect on the broadcast press to be unconstitutional.*

In spite of its view that the ruling of the Court of Appeals is sound and well reasoned, NBC urges that certiorari be granted. This Court has already decided, quite properly in our view, to review the ruling in the *Red Lion*

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* It should be noted that, while the issues considered by the Seventh Circuit are not unrelated to questions posed by other applications of the so-called "fairness doctrine" or by Section 315 of the Communications Act, the Court's only ruling was that the particular rules here challenged burden free expression in a manner which the First Amendment does not permit. The Court specifically refrained from deciding the constitutionality of the fairness doctrine and made no mention of the constitutionality of Section 315. (Cf. Petition for Certiorari of the United States and the Federal Communications Commission, p. 8.)

case.** The issues raised by the *Red Lion* case and by this case are among the most important ever presented to this Court in the area of communications and broadcasting. The manner in which this Court resolves them may have a profound effect on the future course of broadcasting and the relationship between broadcasting and government.

As respondents previously observed in their petition for certiorari before judgment in this case, there are several reasons why consideration of this case along with *Red Lion* will be of assistance to the Court in deciding the proper scope of the Commission's authority in this vital area. Those reasons can be briefly summarized as follows:

1. While this case presents some of the same fundamental issues of the constitutionality and the statutory basis of the Commission's personal attack policy as does the *Red Lion* case, this case contains additional elements which should be considered at the same time. As the United States and the Federal Communications Commission say in their petition for certiorari in this case (page 7):

> ". . . the decision of this Court in Red Lion will not necessarily determine the issues in the present case. Implementation of the Commission's personal attack policy by rule of general applicability and direct en-

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** In a decision handed down since the ruling in *Red Lion* the Court of Appeals for the District of Columbia Circuit has expressed doubt as to the validity of some of the Commission's policies in this area:

> "It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets." (*Banzhaf* v. *Federal Communications Commission*, United States Court of Appeals for the District of Columbia Circuit, November 21, 1968, Slip Opinion, pp. 31-32).

forceability might be considered as involving questions distinguishable from those raised by the issuance of an *ad hoc* ruling bearing no direct sanctions."

As we observed in our previous petition, the principal inhibitory effect upon speech is felt at the time the programs are selected and scripts are prepared, when the broadcaster has the rules and other expressions of the policy before them and not the specificity of a particular after-the-fact directive. Moreover, the only formal sanction for the violation of the order in issue in *Red Lion* was denial of renewal of Red Lion's license when it expired, whereas violation of the rules challenged here invokes possible liability, on a case-by-case basis, for civil forfeitures, criminal fines, and cease-and-desist orders, in addition to loss of license.

2. The rules challenged here involve the Commission's policy requiring a station that broadcasts editorials supporting or opposing a political candidate to notify each disfavored candidate, supply a copy of the editorial, and offer free broadcast time for reply, a policy not involved in *Red Lion*.

3. The impact of the Commission's personal attack and political editorializing doctrine will not be confined to only a few isolated licensees; its chilling effect will be felt by all broadcast journalists. It is therefore essential that, in deciding the important questions presented here, the Court have before it parties representative of the networks, stations and broadcast journalists upon whom the impact of the Commission's policy falls.

4. This case presents a more complete record than the bare exchange of letters giving rise to the *Red Lion* litiga-

tion because it resulted from a formal rule-making proceeding and shows the anticipated effect of the Commission's rules on all broadcast journalists.

CONCLUSION

In view of the considerations set out above, and in view of the novelty and complexity of the questions presented, and the major impact which a decision in the case will have on the vigor and quality of the discussion of public affairs in the United States, we respectfully request that certiorari be granted, that this case be placed on the Court's regular calendar as was done in *Red Lion*, and that full time be allowed for the argument of each case.

Respectfully submitted,

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